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OFFICE OF PETITIONS

In re Application of
David Glanzman
Application No. 09/669,234
Filed: September 25, 2000
Attorney Docket No. Glanzman-Tent

ON PETITION

This is a decision on the petition under 37 CFR 1.137(a) or in the alternative under 37 CFR 1.137(b), filed September 15, 2003, which is being treated as a petition under 37 CFR 1.137(a).

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled, "Renewed Petition under 37 CFR 1.137(a)."

The above-identified application became abandoned for failure to timely reply to the Notice to File Missing Parts of Nonprovisional Application, mailed November 7, 2000. This Notice set a shortened statutory period for reply of three months to submit the statutory basic filing fee, the oath or declaration, and the surcharge for late filing of the oath or declaration. NO extensions of time under 37 CFR 1.136(a) were obtained. No reply having been received, the above-identified application became abandoned on February 8, 2001. A Notice of Abandonment was mailed on August 16, 2002.

CONSIDERATION OF PETITION UNDER 1.137(A) (UNAVOIDABLE DELAY)

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The instant petition has not satisfied requirements (1) or (3).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."¹

Furthermore, a delay resulting from the lack of knowledge or improper application of the patent statute, rules of practice or the MPEP does not constitute an "unavoidable" delay.²

With regards to requirement (3), petitioner contends that he did not receive the Notice to File Missing Parts of Nonprovisional Application. To establish nonreceipt of an Office action, a practitioner must: (1) include a statement that the Office communication was not received; (2) attest to the fact that a search of the file jacket and docket records indicates that the Office communication was not received; and (3) attach a copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed.³ Here, petitioner has not included a copy of a docket record. As set forth in the Manual of Patent Examining Procedure, a docket record must be one "where the nonreceived Office communication would have been entered had it been received and docketed."⁴ For example, a "copy of the docket report showing all replies docketed for a date [two months] from the mail date of the nonreceived Office action must be submitted as documentary proof

¹ In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² See Haines v. Quigg, 673 F. Supp. 314, 317, 5 USPQ2d 1130, 1132 (N.D. Ind. 1987), Vincent v. Mossinghoff, 230 USPQ 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 USPQ 1091 (D.D.C. 1981); Potter v. Dann, 201 USPQ 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

³ See MPEP 711.03(c)(II).

⁴ Id.

of nonreceipt of the Office action."⁵

With regards to requirement (1), petitioner must submit the amount presently due for the statutory basic filing, as well as an oath or declaration and the current surcharge for its late filing. A copy of the Notice to File Missing Parts of Nonprovisional Application is enclosed for petitioner's convenience.

The small entity filing fee for a petition under 37 CFR 1.137(a) in the amount of \$55 has been charged to petitioner's deposit account, as authorized.

CONCLUSION

If petitioner does not feel that he can establish that the entire period of delay was unavoidable, petitioner may wish to seek to revive the above-identified application under the provisions of 37 CFR 1.137(b), unintentional delay. A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by (1) The reply required to the outstanding Office action or notice, unless previously filed; (2) The petition fee as set forth in 37 CFR 1.17(m) - currently \$665 for a small entity; (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and (4) Any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to paragraph (d) of this section.

The file does not indicate a change of address has been submitted, although the address given on the petition differs from the address of record. If appropriate, a change of address should be filed in accordance with MPEP 601.03. A courtesy copy of this decision is being mailed to the address given on the petition; however, the Office will mail all future correspondence solely to the address of record.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
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⁵ Id.

Arlington, Virginia

Telephone inquiries concerning this decision should be directed to the undersigned at (703) 305-0272.

Cliff Congo

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Office of Petitions

Enc: Notice to File Missing Parts of Nonprovisional Application
(1 page)

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